HON'BLE SRI JUSTICE GODA RAGHURAM
AND
HON'BLE SRI JUSTICE R. SUBHASH REDDY

W.P.NO. 26015 OF 2006

DATED: 14.11.2007

Between:

Y.A. Mohan Rao

… Petitioner

and

The Principal District and Sessions
Judge, Khammam

… Respondent

HON'BLE SRI JUSTICE GODA RAGHURAM
AND
HON'BLE SRI JUSTICE R. SUBHASH REDDY

W.P.NO. 26015 OF 2006

ORAL ORDER: (PER GR.J)

By the order impugned, dated 18.10.2006 of the respondent, the petitioner was reverted to the post of Senior Assistant from the post of Superintendent, with effect from 19.4.2004 and his pay directed to be re-fixed in the post of Senior Assistant, with effect from 19.4.2004 and the pay and allowances drawn by the petitioner from 19.4.2004 to 31.3.2006, the date of the petitioner's voluntary retirement (impliedly the difference in pay and allowance between the post of Superintendent and the post of Senior Assistant) are directed to be recovered. The Junior Civil Judge, Yellandu, is also directed to prepare the pension papers of the petitioner accordingly.

The relevant facts leading to the issuance of the impugned order are as under:

After initial appointment as a Copyist in the A.P. Judicial Ministerial Service with effect from 7.7.1971, the petitioner was promoted as LDC in 1973 and as UDC in 1992. By an order of the

respondent dated 15.12.2003, the petitioner was promoted as a Head Clerk (in Category-III of the A.P. Judicial Ministerial Service Rules, 1964 issued in G.O.Ms.No.206, Home (Courts-A) Department, dated 17.2.1964 (for short 'the Old Rules, 1964'). On 16.2.2006, the petitioner applied for voluntary retirement and by an order dated 22.3.2006, was permitted to retire pursuant to his application, with effect from 31.3.2006.

Earlier on 19.4.2004, the respondent issued an order treating the petitioner as having been upgraded and designated as Superintendent in the time scale of pay of Rs.5000-10600, subject to passing the prescribed departmental tests and specifying that his probation in the designated post (Superintendent) would start only on the passing of such test within two years from the date of the order.

In the impugned order, it is recorded that the petitioner was designated as a Superintendent in the proceedings dated 19.4.2004 with a condition that he should pass the departmental tests within the prescribed period and his probation would start only on the passing of such tests within two years from the date of the proceedings; that for the post of a Superintendent, one is required to pass the translation test as per the A.P. Judicial Ministerial Service Rules, 2003 (for short 'the 2003 Rules'); that a notice dated 15.4.2006 was issued to show cause why the petitioner be not reverted as Senior Assistant for having failed to pass the Translation test; that the explanation of the petitioner to the show cause notice was not satisfactory; and therefore the petitioner must be reverted as Senior Assistant.

Earlier by the proceedings dated 15.12.2003, the respondent

issued an order temporarily promoting the petitioner as a Head Clerk (a Category-III post under the 1964 Rules), with posting in the court of the Junior Civil Judge, Sathupally. Though the promotion was pursuant to a process of interview as spelt out in the order dated 15.12.2003, the note to the order stipulated that the promotion is purely temporary and that the petitioner is liable to be reverted at any time without assigning any reasons or notice.

In the counter affidavit filed by the respondent, it is stated that the petitioner was promoted as a Head Clerk, by an order dated 15.12.2003, after coming into force of the 2003 Rules (the 2003 Rules came into force by the Gazette Publication, on 5.12.2003). On noticing that under the 2003 Rules, the post of Head Clerk stood re-designated as Superintendent in Category 2 of the service, proceedings dated 19.4.2004 were issued declaring the petitioner as having been re-designated as Superintendent. In these proceedings, the petitioner was also required to pass the departmental test within a period of 2 years with a further declaration that his probation in the designated post (Superintendent) would start only on his passing the said test within a period of 2 years from the date of the order.

The counter affidavit further states that the qualifications prescribed for the post of Superintendent under the 2003 Rules are, inter alia a pass in the Translation test, which the petitioner does not possess. Since the petitioner failed to acquire the pre-requisite qualification even within the time stipulated in the order dated 19.4.2004, but had meanwhile opted for voluntary retirement from service on 31.3.2006, the impugned order was issued directing his

reversion to the post of Senior Assistant and further directing recovery of difference in pay between the post of Superintendent and that of Senior Assistant, is the substantive defence.

The petitioner assails the impugned order principally on two grounds:

(a) ***That no order of reversion or one directing recovery of the excess pay wrongfully paid could be issued after cessation of the master and servant relationship, on the petitioner's voluntary retirement from service with effect from 31.3.2006; and***

(b) ***That as the petitioner did function and render service as Head Clerk, a post re-designated as Superintendent under the 2003 Rules, recovery of the excess pay made even if his appointment to the post of Head Clerk/Superintendent is illegal/irregular, ought not to be made as it is arbitrary.***

The 2003 Rules became operational from 5.12.2003 on their publication in the A.P. Gazette. Rule 5 of the 2003 Rules enumerates the constitution of the service into the several categories of posts specified therein. Category (2) enumerates the post of Superintendent, which incorporates inter alia the earlier category of Head Clerk of District Munsif Courts. Category (3) of this service enumerates the post of Senior Assistant, which includes former UDCs. Rule 6 sets out the method of appointment to the various categories of the service. Insofar as the category of Superintendents is concerned, Rule 6 enjoins that appointment to this category shall be by promotion from the category of Senior Assistants (Category 3). Rule 8 of these Rules enacts that no person shall be eligible for appointment to the categories specified in Column (1) of Annexure-1 to these rules, by the

method specified in Column (2) unless such person possesses the qualification specified in the corresponding entry in column (3) of the Annexure. Insofar as the post of Superintendent is concerned, the annexure (referable to Rule 8) enjoins that for appointment by promotion as Superintendent, a candidate must have passed the Translation test namely; translation from English to the regional language and from the regional language to English.

Rule 38 of the 2003 Rules incorporates transitory provisions. These read:

> ***"In case of persons who are in service on the date of issue of these rules and who are eligible for promotion or transfer to a higher post and for whom a test is now prescribed as a pre-requisite for such promotion or appointment by transfer but for whom such test was earlier required to be passed after promotion or transfer within the period of probation, may be promoted or transferred, even though they had not passed the tests, but shall be required to pass the test within the prescribed period of probation for such higher post. This concession shall be in force for a period of two years from the date of issue of these rules."***

On a true and fair construction of the provisions of Rule 38, the conclusion is inescapable that Rule 38 is inapplicable to the case of the petitioner. Under the Old Rules 1964, the petitioner was not required to pass the translation test as a condition precedent for promotion to the post of Head Clerk (since re-designated as Superintendent) nor was a pass in the translation test mandatory after promotion to the post of Superintendent. This position is clear from the circular of the A.P. High Court bearing ROC No.552/98-C/1 dated 8.4.2002.

Rule 38, in terms and substance applies where persons who

are in service as on the date of the issue of the 2003 Rules, are eligible for promotion or transfer to a higher post and for whom a test is now prescribed as a condition precedent for such promotion or appointment by transfer, but for whom such test was earlier required to be passed after the promotion or transfer and within the time of probation. Such persons are now rendered eligible for promotion or transfer even without prior passing of such test, so however that such person must pass the test within the prescribed period of probation for such higher post, the concession to be in force for a period of 2 years from 5.12.2003 (the date of issue of the 2003 Rules).

This is not the operative legal regime in the case of the petitioner. The petitioner was not required to pass the Translation test as a condition precedent to promotion as a Head Clerk (under the old Rules, 1964). The requirement of passing a Translation test is a condition freshly imposed by the 2003 Rules.

As on 15.12.2003, the date the order was issued by the respondent promoting the petitioner as Head Clerk, there was no post of a Head Clerk. The post stood re-designated as Superintendent in Category 2 of the constitution of the service under the 2003 Rules. Even if the label were to be eschewed, the petitioner could not have been promoted as a Superintendent on 15.12.2003 since under the 2003 Rules (which had by then come into operation), passing the Translation test was a condition precedent for promotion of a UDC/Senior Assistant to the post of Superintendent. The petitioner admittedly never passed the Translation test. He was therefore

ineligible for promotion as Superintendent. His promotion as Head Clerk by the order dated 15.12.2003 and the re-designation as Superintendent by the order dated 19.4.2004 of the respondent was therefore clearly the product of an administrative ignorance or misconception of the 2003 Rules. The petitioner, however, had no contributory role nor had he fertilized such error or misconception of the respondent. The fact of the matter also is that the petitioner did render service as a Head Clerk from 12.1.2004 to 19.4.2004 and as a Superintendent thereafter till his retirement on voluntary basis on 31.3.2006. He was also paid the salary and allowances applicable to the post of Head Clerk/Superintendent during this period. It is, therefore, but fair that on realization of the error and restitution of the legal position, the petitioner is reverted to the post of Senior Assistant. The recovery of the excess salary and emoluments paid to him in the post of Head Clerk/Superintendence, however appear to this court to be patently arbitrary and inequitable.

In the context of the above view taken by this court, it is not necessary to consider the other contention of the petitioner that no recoveries could be effected for the excess payments made, after cessation of the master and servant relationship, on the petitioner's voluntary retirement.

On the aforesaid analysis, the impugned order dated 18.10.2006 of the respondent is partly set aside. The order to the extent it directs reversion of the petitioner to the post of Senior Assistant with effect from 19.4.2004 is impeccable and is upheld. The further direction that his pay be re-fixed in the post of Senior

Assistant with effect from 19.4.2004 is also upheld. However, the further direction that the pay and allowances paid to him (the difference in pay and allowances) from 19.4.2004 to 31.3.2006 (the date of the petitioner's voluntary retirement from service), is unsustainable and is accordingly set aside. There shall be no recoveries. The petitioner's terminal benefits will now be worked out on the basis that he had retired from service as Senior Assistant as on 31.3.2006. The respondent shall take appropriate administrative measures to expedite the processing of the petitioner's terminal benefits including pension. If there be departmental proceedings pending, the petitioner's terminal benefits shall be processed in accordance with the provisions of the A.P. Revised Pension Rules, 1980, expeditiously, for grant of provisional pension.

The writ petition is allowed in part as above. There shall be no order as to costs.

GODA RAGHURAM, J

R. SUBHASH REDDY, J

Date: 14.11.2007
cvm